

## REMARKS

Applicants have reviewed this application in light of the Office Action mailed October 12, 2007. Claims 1-23 are pending in this Application. Claims 1-3, 5-14, and 17-23 stand rejected under 35 U.S.C. § 102, Claims 4, 15, and 16 stand rejected under 35 U.S.C. § 103, and Claims 1-12 stand rejected under 35 U.S.C. § 112. Claims 1, 10, and 17 have been amended. Applicants respectfully request reconsideration and favorable action in this case.

### **Summary of Examiner Interview**

Attorney for Applicants, Eric Grabski, spoke with Examiner Zhe on February 11, 2008 to discuss the Examiner's rejection of Claim 17 under 35 U.S.C. §112. The Examiner indicated that Claim 17 is, in fact, properly formatted, and the rejection of Claim 17 under 35 U.S.C. §112 would be withdrawn. Applicants thank the Examiner for her consideration of the matter.

### **Rejections under 35 U.S.C. § 112**

Claims 1-23 are rejected by the Examiner under 35 U.S.C. §112, second paragraph. In particular, the Examiner alleges that it is unclear how "a performance ratio" is determined. Applicants have amended Claims 1, 10, and 17 to further clarify the term "performance ratio." Therefore, Applicants request that the Examiner withdraw this rejection.

In addition, software Claim 17 was further rejected by the Examiner under 35 U.S.C. §112, second paragraph, with respect to the formatting of the software claim. As discussed above, the Examiner indicated during a telephone interview on February 11, 2008 that Claim 17 is properly formatted and this rejection of Claim 17 would be withdrawn.

### **Rejections under 35 U.S.C. § 102**

Claims 1-3, 5-14 and 17-23 were rejected under 35 U.S.C. §102(e) as being anticipated by U.S. Patent No. 6,718,486 issued to Drew Shaffer Roselli et al. ("*Roselli*").

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 U.S.P.Q.2d 1051, 1053 (Fed. Cir. 1987). Furthermore, "the identical invention must be shown in as complete detail as is

contained in the ... claim.” *Richardson v. Suzuki Motor Co. Ltd.*, 868 F.2d 1226, 1236, 9 U.S.P.Q.2d 1913, 1920 (Fed. Cir. 1989).

Applicants respectfully submit that *Roselli* cannot anticipate the rejected claims, because *Roselli* does not show all the elements of Applicants’ claims. For example, regarding amended Claim 1, *Roselli* fails to teach “calculating a performance ratio between a performance-related characteristic identified for a failing-over cluster node and a similar performance-related characteristic identified for a fail-over cluster node.” *Roselli* fails to teach calculating *any* ratios, much less a ratio between a performance-related characteristic identified for a failing-over cluster node and a similar performance-related characteristic identified for a fail-over cluster node.

According to the Examiner, *Roselli* teaches “identifying a performance ratio between a failing-over cluster node and a fail-over cluster node (Column 9, line 63-Column 10, line 5; Column 10, lines 10-22, lines 25-39; Column 19, lines 53-57).” (Office Action, page 3). *Roselli* teaches:

For load balancing operation, the distributed resource management unit **46** through operation of the fault-tolerance unit **46<sub>2</sub>** detects when a particular resource in a cluster or group of clusters is being taxed or is likely to be taxed more than other comparable resources and takes appropriate action to reschedule some of the jobs to a less taxed resource, thereby achieving load-balancing. (col. 9, line 66 – col. 10, line 5) (emphasis added).

Thus, according to this portion of *Roselli*, a “a distributed resource management unit **46** of the fault-tolerance unit **46<sub>2</sub>**” detects if an individual “particular resource” is taxed and simply reschedules the job to a less taxed resource. *Roselli* does not teach or suggest calculating a “performance ratio” between two resources in order to reschedule jobs.

*Roselli* also teaches:

The distributed resource management unit **46** uses a persistent storage unit **46<sub>3</sub>** in order to allow applications such as the services **44<sub>1</sub>**, **44<sub>2</sub>**, **44<sub>3</sub>**, . . . , **44<sub>s</sub>** to store state information about executing processes to nonvolatile memory of persistent storage unit **46<sub>3</sub>** in a consistent way. Such state information typically includes computational results and data to checkpoint the executing application at restartable execution points. Checkpoints are selected to store operating parameters and progress of an application after major computational steps or at certain points in the execution sequence. If a failure occurs,

applications that operate with such checkpoints are restarted by the fault-tolerance unit 46<sub>1</sub> and/or the load-balancing unit 46<sub>2</sub> at the last successfully completed checkpoint. (col. 10, lines 6-22) (emphasis added).

This portion of *Roselli* merely teaches that if a failure happens, applications are restarted at the last completed checkpoint by a load-balance unit 46<sub>2</sub>. There is no teaching that load-balance unit 46<sub>2</sub> “calculat[es] a performance ratio.”

*Roselli* further teaches:

The interface unit 46<sub>4</sub> is part of the resource management unit 46. The interface unit 46<sub>4</sub> collects and provides output information and receives input information and commands that allow humans to monitor and control the computer system 2 (see FIG. 1) and each of the components and parts thereof. The interface unit 46<sub>4</sub> logs data and processes the logged data to form statistics about the overall system and about each component in the system including up-time, down-time, failure, performance, configuration, versions, through-put and other component and system information. The interface unit 46<sub>4</sub> provides data for system availability measurements, transaction tracking and other information that may be desirable or required. Such output data is useful for, among other things, satisfying obligations in service agreements with customers that require contracted levels of system availability and transaction tracking for satisfying legal or other obligations. (Col. 10, lines 23-39) (emphasis added).

This portion of *Roselli* merely teaches providing performance data information for individual components so that a customer may monitor if each individual component is working satisfactorily according to service agreements. There is n teaching of “calculating a performance ratio” between individual components.

For at least these reasons, *Roselli*, does not teach “calculating a performance ratio between a performance-related characteristic identified for a failing-over cluster node and a similar performance-related characteristic identified for a fail-over cluster node,” as recited in amended Claim 1.

Therefore, Applicants respectfully request reconsideration and allowance of amended Claim 1, as well as Claims 2-9 that depend from Claim 1. In addition, for analogous reasons, Applicants request reconsideration and allowance of amended independent Claims 10 and 17, as well as Claims 11-16 and Claims 18-23 that depend from Claims 10 and 17.

**Rejections under 35 U.S.C. §103**

Claims 4, 15 and 16 were rejected under 35 U.S.C. §103(a) as being unpatentable over *Roselli*. Claims 4, 15, and 16 are allowable at least because they depend from Claims 1 and 10 shown above to be allowable.

**CONCLUSION**

Applicants appreciate the Examiner's careful review of the application. Applicants have now made an earnest effort to place this case in condition for allowance in light of the amendments and remarks set forth above. For the foregoing reasons, Applicants respectfully request reconsideration of the rejections and full allowance of claims 1-23, as amended.

Applicants authorize the Commissioner to charge \$120.00 for a One-Month Extension of Time to Deposit Account No. 50-2148 of Baker Botts L.L.P.

Applicants believe there are no other fees due at this time, however, the Commissioner is hereby authorized to charge any fees necessary or credit any overpayment to Deposit Account No. 50-2148 of Baker Botts L.L.P.

If there are any matters concerning this Application that may be cleared up in a telephone conversation, please contact Applicants' attorney at 512.322.2689.

Respectfully submitted,  
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Date: February 11, 2008

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